



In the Supreme Court of the United States.

OCTOBER TERM, 1915.

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| THE MARYLAND DREDGING AND CON- | } No. 310. |
| tracting Company (Inc.), appellant, | |
| v. | |
| THE UNITED STATES. | |

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This is an appeal from a judgment dismissing the petition on the demurrer of the Government.

Appellant agreed to construct a channel from Beaufort Inlet to Pamlico Sound, North Carolina, through Adams and Core Creeks, and through the intervening dry land between the heads of these creeks. The work was commenced 45 days after the date of the approval of the contract by the Chief of Engineers, on September 14, 1908, and was to be completed on March 14, 1910. It was not completed until November 15, 1910. At the time of final settlement the Government retained the sum of \$7,320 as liquidated damages for delays, and

\$210.50 as cost of superintendence and inspection during the period of delay. The following paragraphs of the contract are pertinent (Rec. 2-4):

It is further expressly understood and agreed that time shall be considered as an essential feature of this contract, and that in case of the failure upon the part of the party of the second part to complete this contract within the time as specified and agreed upon that the party of the first part will be damaged thereby, and the amount of said damages being difficult, if not impossible, of definite ascertainment and proof, it is hereby agreed that the amount of said damages shall be estimated, agreed upon, liquidated, and fixed in advance, and they are hereby agreed upon, liquidated, and fixed at the sum of twenty dollars (\$20) for each division for each and every day the party of the second part shall delay in the completion of this contract, and the party of the second part hereby agrees to pay to the United States as liquidated damages, and not by way of penalty, the sum of twenty dollars (\$20) for each division for each and every day the party of the second part shall delay in the completion of this contract, said delay not being the fault of the party of the first part.

It is further understood and agreed that the United States shall also have the right to recover from the party of the second part all costs of inspection and superintendence incurred by the United States during the period of delay, and also a reasonable value of any labor and materials which may be furnished

by the party of the first part to the party of the second part during the time the latter is proceeding under this contract. And the party of the first part may deduct or retain all of the above-mentioned sums out of or from any money or reserved percentage that may be due or become due the party of the second part under this agreement.

Provided, however, That if the party of the second part shall by strikes, epidemics, local or State quarantine restrictions, *or by abnormal force or violence of the elements*, be actually prevented from completing the work or delivering the materials at the time agreed upon in this contract, and such delay is without contributory negligence on his or their part, such additional time may, with the prior sanction of the Chief of Engineers, be allowed him or them, in writing, for such completion as, in the judgment of the party of the first part, or his successor, shall be just and reasonable; but such allowance or extension shall in no manner affect the rights or obligations of the parties under this contract, but the same shall subsist, take effect, and be enforceable precisely as if the new date for such commencement or completion had been the date originally herein agreed upon. * * *

16. The time allowed in these specifications for the completion of the contract to be entered into is considered sufficient for such completion by a contractor having the necessary plant, capital, and experience, *unless extraordinary and unforeseeable conditions supervene.*

* * * [Italics ours.]

22. *Character of material.*—The material is believed to be soft mud, sand, clay, shell, and silt. Each bidder, however, is expected to examine and decide for himself, as no allowance will be made should any of it prove to be otherwise than as stated, except that solid rock, large bowlders, and compact gravel will not have to be removed at the prices bid for ordinary excavation. If such materials should be encountered their removal, if required by the engineer, will be done under special agreement and paid for as extra work, as provided for in the form of contract to be entered into.
* * *

24. *Clearing.*—All trees growing in the area to be excavated and within 25 feet of the banks of the excavation will be removed by the contractor. The contractor shall have the right to use timber so cut in such accessory works as he may deem desirable. *The channel must be cleared of all snags, logs, roots, stumps, or wreckage that project into or encroach in any way upon the cross section, as indicated in paragraph 27, the cost of same being included in the unit price bid for excavation.* * * *
[Italics ours.]

27. *Excavation.*—Dredges, or other appliances will work on lines and in positions laid out by the engineer. Care must be taken to leave a reasonably even bottom at the depth required and a close approximation to the required side slopes. The contractor will be required to go over his work, if necessary, to produce this result.

Appellant contends that during the performance of the work it encountered a "submerged forest," which caused the delay in completing the contract; that this obstruction was due to "abnormal force and violence of the elements" and was "extraordinary and unforeseeable," and therefore such as to excuse the delay for which liquidated damages have been withheld. (Rec. 2 and 3, brief 11.)

The Government maintains that the "submerged forest" does not come within the classification of extraordinary and unforeseeable conditions caused by an abnormal force and violence of the elements and such as would excuse the delay of appellant; that the Government was in no way responsible; and that appellant, having made its own examination and not exempted itself by the terms of the contract, was responsible.

ARGUMENT.

The "submerged forest" was not a condition which would excuse appellant from the terms of the contract for delay caused thereby.

The only question in this case is whether the encountering of a "submerged forest" which appellant so picturesquely describes, and which it is alleged caused the delay that ensued herein, can relieve appellant from the effect of the liquidated-damage clause. Under paragraph V of the contract the obstruction is not comprehended by the phrase "strikes, epidemics, local or State quarantine restrictions, or by abnormal force or violence of the elements." * * * (Rec. 2.)

The phrase "abnormal force or violence of the elements" presupposes an action of nature happening subsequent to the signing of the contract. This is borne out by the language found in section 16 (Rec. 3), wherein it says that "unless extraordinary and unforeseeable conditions *supervene*," the time allowed by the contract is deemed sufficient. The word "*supervene*" indicates conditions happening after the signing of the contract. Webster's Dictionary interprets "*supervene*" synonymously with "follow;" "to be added or to follow closely."

In this case the "forest" was "submerged" before the contract was signed. It may have been submerged ten or a thousand years before. The petition does not throw any light upon this, nor does it show that it was submerged by an "abnormal force or violence," although the pleader alleges this as its own conclusion.

Furthermore this court has held repeatedly that unforeseen difficulties, however great, will not excuse failure to perform a contract. In the case of the *Carnegie Steel Company v. The United States*, decided February 21, 1916, it is stated that "unforeseen difficulties, however great, will not excuse performance of a contract unless they have been guarded against by a proper stipulation."

Dermott v. Jones (2 Wall. 1, 7, 8).

Sun Printing and Publishing Assn. v. Moore (183 U. S. 642).

The Harriman (Admiralty) (9 Wall. 161).

Section VII (Rec. 15) warned appellant "to estimate correctly the difficulties attending the execution of the work."

Section XXII (Rec. 18) required each bidder "to examine and decide for himself" the character of the material to be excavated.

Section 24 (Rec. 18) states: "The channel must be cleared of all snags, logs, roots, stumps, or wreckage that project into or encroach in any way upon the cross section." * * *

Section XXIX (Rec. 19) made known the necessity for a "dredge, or snagboat."

In view of the foregoing and the fact that it is not claimed that an "abnormal violence" occurred after the signing of the contract, it is maintained that the alleged obstruction was not such as would excuse the delay.

Appellant claims (Par. VIII, Rec. 10) that it made an "exhaustive examination and inspection of the proposed work * * * at the time of the submission of the said bid and the execution of the said contract." It also asserts that the "submerged forest" was unknown to any person. It is apparent, therefore, that appellant did not rely upon representations of the Government, nor was it pleaded that the Government was in any way responsible. The contrary is conceded by the contractor. (Brief, p. 12.)

Appellant argues (brief, 36) that "The first paragraph of Article V of the contract contemplated a penalty and not liquidated damages." It was

agreed, however, between the parties that time should be of the essence of the contract; that in the event of failure to complete performance within a specified time the Government would be damaged thereby an amount "difficult, if not impossible, of definite ascertainment and proof," and that the amount of damages should therefore be estimated and agreed upon in advance. (Art. V, Rec. 22.)

The case of the *United States v. The Bethlehem Steel Company* (205 U. S., 105, 119) is conclusive of the right of the Government to charge liquidated damages without a showing of actual damages in the premises.

There are a number of other points raised in appellant's brief to which the Government will not reply.

It is respectfully submitted that the judgment of the lower court should be affirmed.

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